

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Feb 14, 2023**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KATHLEEN S.,<sup>1</sup>

Plaintiff,

v.

KILOLO KIJAKAZI,  
ACTING COMMISSIONER OF  
SOCIAL SECURITY,<sup>2</sup>

Defendant.

No. 2:21-CV-00179-ACE

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

**ECF Nos. 16, 19**

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 16, 19. Attorney D. James Tree represents Kathleen S. (Plaintiff); Special Assistant United States Attorney Justin L. Martin represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the

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<sup>1</sup> To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names.

<sup>2</sup> Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary  
2 Judgment and **DENIES** Defendant's Motion for Summary Judgment.

### 3 **JURISDICTION**

4 Plaintiff protectively filed an application for Disability Insurance Benefits on  
5 January 25, 2016, alleging disability since April 1, 2009. Tr. 15, 79. The  
6 applications were denied initially and upon reconsideration. Tr. 80-88, 90-99.  
7 Administrative Law Judge (ALJ) Kimberly Boyce held a hearing on October 24,  
8 2017, Tr. 37-78, and issued an unfavorable decision on June 18, 2018. Tr. 12-27.  
9 Plaintiff requested review by the Appeals Council and the Appeals Council  
10 declined to review the decision. Tr. 1-6. Plaintiff then appealed the denial to this  
11 Court, which resulted in a stipulated remand order dated January 13, 2020, in  
12 which the parties stipulated that the ALJ would take any steps necessary to develop  
13 the administrative record, issue a new decision, conduct a de novo hearing (if a  
14 fully favorable decision could not be issued on the record), reevaluate whether  
15 Plaintiff's impairments met or equaled a listed impairment, reevaluate the medical  
16 opinion evidence, reevaluate Plaintiff's RFC, and obtain supplemental vocational  
17 expert testimony, if necessary. Tr. 1033-35. On February 28, 2020 the Appeals  
18 Council vacated the prior ALJ decision and remanded the case to an ALJ. Tr.  
19 1039-40. On July 27, 2020, and in a supplemental hearing February 8, 2021<sup>3</sup>,  
20 Plaintiff appeared before ALJ Lori Freund, who issued an unfavorable decision on  
21 March 23, 2021. Tr. 868-90, 897-41, 942-95. The Appeals Council did not  
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23 <sup>3</sup> The ALJ held a supplemental hearing on February 8, 2021. *See* Tr. 871,  
24 941. There is a typographical error in the hearing date on the first and third pages  
25 of the February 2021 hearing transcript, however, which lists the supplemental  
26 hearing date as "February 8, 2020." Tr. 897, 899. The date is written correctly in  
27 the transcription of the ALJ's opening statement and on the last page of the hearing  
28 transcript. Tr. 899, 941.

1 assume jurisdiction of the case, making the ALJ's March 2021 decision the final  
2 decision of the Commissioner, which is appealable to the district court pursuant to  
3 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on May 28, 2021.  
4 ECF No. 1.

### 5 STANDARD OF REVIEW

6 The ALJ is tasked with "determining credibility, resolving conflicts in  
7 medical testimony, and resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035,  
8 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with  
9 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,  
10 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed  
11 only if it is not supported by substantial evidence or if it is based on legal error.  
12 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is  
13 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at  
14 1098. Put another way, substantial evidence is such relevant evidence as a  
15 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*  
16 *Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305  
17 U.S. 197, 229 (1938)). If the evidence is susceptible to more than one rational  
18 interpretation, the Court may not substitute its judgment for that of the ALJ.  
19 *Tackett*, 180 F.3d at 1098; *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595,  
20 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or  
21 if conflicting evidence supports a finding of either disability or non-disability, the  
22 ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230  
23 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be  
24 set aside if the proper legal standards were not applied in weighing the evidence  
25 and making the decision. *Browner v. Sec'y of Health and Human Servs.*, 839 F.2d  
26 432, 433 (9th Cir. 1988).

## SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. § 404.1520(a), 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four the claimant bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents the claimant from engaging in past relevant work. 20 C.F.R. § 404.1520(a)(4), 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show (1) that Plaintiff can perform other substantial gainful activity and (2) that a significant number of jobs exist in the national economy which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1497-1498 (9th Cir. 1984); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). If a claimant cannot make an adjustment to other work in the national economy, the claimant will be found disabled. 20 C.F.R. § 404.1520(a)(4)(v), 416.920(a)(4)(v).

## ADMINISTRATIVE FINDINGS

On March 23, 2021, the ALJ issued a decision finding Plaintiff was not disabled as defined in the Social Security Act through her date last insured of June 30, 2010. Tr. 868-90.

At step one, the ALJ found Plaintiff, who met the insured status requirements of the Social Security Act through June 30, 2010, had not engaged in substantial gainful activity during the period from her alleged onset date of April 1, 2009 through her June 30, 2010 date last insured. Tr. 874.

At step two, the ALJ determined through the date last insured Plaintiff had the following severe impairments: degenerative disc disease of the cervical and lumbar spine; left shoulder impingement syndrome; osteoarthritis of the hips; and hypertension. *Id.*

1 At step three, the ALJ found through the date last insured, Plaintiff did not  
2 have an impairment or combination of impairments that met or medically equaled  
3 the severity of one of the listed impairments. *Id.*

4 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found  
5 that through her date last insured she could perform light work, with the following  
6 limitations:

7  
8 [Plaintiff] could sit for one hour at a time and up to six hours total in  
9 an eight-hour workday; she could stand and/or walk for one hour at a  
10 time and up to four hours total in an eight-hour day; she could never  
11 crawl or climb ladders, ropes, or scaffolds; she could occasionally  
12 balance, stoop, kneel, crouch, and climb ramps or stairs; she should  
13 avoid all unprotected heights, dangerous machinery, extreme cold and  
14 heat, and excessive vibration; and she should avoid even moderate  
15 exposure to the operational control of moving machinery.

16 Tr. 877.

17 At step four, the ALJ found Plaintiff was unable to perform past relevant  
18 work. Tr. 881.

19 At step five, the ALJ found that, based on the testimony of the vocational  
20 expert, and considering Plaintiff's age, education, work experience, and RFC,  
21 through the date last insured Plaintiff could perform jobs that existed in significant  
22 numbers in the national economy, including the jobs of production assembler;  
23 assembler (electronics accessories); and routing clerk. Tr. 882.

24 The ALJ thus concluded Plaintiff was not under a disability within the  
25 meaning of the Social Security Act through June 30, 2010, the date last insured.  
26 Tr. 883.

## 27 ISSUES

28 Plaintiff seeks judicial review of the Commissioner's final decision denying  
her disability insurance benefits under Title II of the Social Security Act. The

1 question presented is whether substantial evidence supports the ALJ's decision  
2 denying benefits and, if so, whether that decision is based on proper legal  
3 standards. Plaintiff raises the following issues for review (1) whether the ALJ  
4 properly evaluated Plaintiff's symptom complaints; (2) whether the ALJ properly  
5 evaluated the medical opinion evidence; (3) whether the ALJ properly applied the  
6 Grid Rules; (4) whether the ALJ conducted a proper step-five analysis; and (5)  
7 whether the ALJ properly assessed the lay witness opinions.

## 8 DISCUSSION

### 9 A. Plaintiff's Symptom Claims

10 Plaintiff contends the ALJ erred by not properly assessing Plaintiff's  
11 testimony. ECF No. 16 at 7-9. It is the province of the ALJ to make  
12 determinations regarding a claimant's subjective statements. *Andrews*, 53 F.3d at  
13 1039. However, the ALJ's findings must be supported by specific, cogent reasons.  
14 *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant  
15 produces medical evidence of an underlying medical impairment, the ALJ may not  
16 discredit testimony as to the severity of an impairment merely because it is  
17 unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.  
18 1998). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting  
19 the claimant's testimony must be "specific, clear and convincing." *Smolen v.*  
20 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834  
21 (9th Cir. 1995). "General findings are insufficient: rather the ALJ must identify  
22 what testimony is not credible and what evidence undermines the claimant's  
23 complaints." *Lester* at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

24 The ALJ concluded Plaintiff's medically determinable impairments could  
25 reasonably be expected to cause the alleged symptoms; however, Plaintiff's  
26 statements concerning the intensity, persistence, and limiting effects of those  
27 symptoms were not fully consistent with the medical evidence and other evidence  
28 in the record. Tr. 878.

1 Plaintiff contends the only reason the ALJ gave was that objective evidence  
2 from the relevant period does not fully support the level of limitation claimed, and  
3 that this is legally insufficient. ECF No. 16 at 7-9. Defendant contends the ALJ  
4 “gave four legally sufficient reasons for discounting her symptom testimony,” but  
5 Defendant only lists three reasons. ECF No. 19 at 9-13.

6 The Court finds the ALJ gave two reasons to discount Plaintiff’s symptom  
7 claims, neither of which was a clear and convincing reason supported by  
8 substantial evidence to discount her symptom claims.

9 *1. Inconsistent with Objective Medical Evidence*

10 The ALJ found that prior to the disability onset date, Plaintiff’s allegations  
11 were inconsistent with objective evidence. Tr. 878-79. An ALJ may not discredit  
12 a claimant’s symptom testimony and deny benefits solely because the degree of the  
13 symptoms alleged is not supported by objective medical evidence. *Rollins v.*  
14 *Massanari*, 261 F.3d 853, 856 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341,  
15 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d 597, 601 (9th Cir. 1989); *Burch*,  
16 400 F.3d at 680. However, the objective medical evidence is a relevant factor,  
17 along with the medical source’s information about the claimant’s pain or other  
18 symptoms, in determining the severity of a claimant’s symptoms and their  
19 disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2),  
20 416.929(c)(2).

21 Here, the ALJ found that “as for the limiting effects of his or her symptoms,  
22 they are inconsistent because the objective evidence from the relevant period does  
23 not fully support the level of limitation claimed.” Tr. 878. The ALJ, however,  
24 provided only a cursory summary of medical evidence, misstated evidence, and  
25 failed to include relevant evidence; and much of the evidence cited supports  
26 Plaintiff’s symptom complaints.

27 The ALJ noted that “medical records establish that [Plaintiff] was involved  
28 in a motor vehicle accident, and [Plaintiff] alleges ongoing pelvic and hip pain



1 stemming from her injuries in that accident.” Tr. 878. This is factually incorrect.  
2 As Plaintiff points out, Plaintiff had a series of significant injuries in the mid-  
3 2000s, including a serious motor vehicle accident in 2006, resulting in C5-C6  
4 fusion surgery for cervical fracture, with residuals including posttraumatic  
5 including cervicothoracic syrinx; she was also hospitalized, however, in early  
6 January 2008 for multitrauma secondary to a fall. ECF No. 16 at 3; *see* 454-55,  
7 2518, 2534-35. Records show she fell 15 feet off her deck and sustained pelvis  
8 and elbow fractures, resulting in surgery for left radial head excision (elbow) along  
9 with inpatient rehabilitation for her injuries in January 2008. *See, e.g.*, Tr. 2518,  
10 2534-35. X-rays at that time showed pelvic fractures, along with advanced  
11 degenerative disc disease in the lower lumbar spine and to a lesser extent the SI  
12 joints. Tr. 2405. A CT scan at that time showed findings including acute left  
13 sacral fracture, right symphysis pubis fracture, and vertical fracture of left pubic  
14 ramus. Tr. 2427. The ALJ indicated these occurred in an earlier accident and  
15 found her pelvic injury nonsevere, when this injury occurred closer to her alleged  
16 onset date and treatment records show residuals and/or reinjury and possible  
17 nonunion of the pelvic fracture through her alleged onset date; the ALJ mentioned  
18 her pelvic fractures briefly at step two and once elsewhere in the decision, and the  
19 medical expert at the hearing failed to mention the accident or injury at all, despite  
20 the fact that Plaintiff’s treating provider, Dr. Abbott opined that her “major injury”  
21 was multitrauma due to the fall with pelvic fractures and left elbow fracture Tr.  
22 862, 2658; *see generally* Tr. 871-83.

23 At step two the ALJ noted Plaintiff’s report of a fall and reinjury to her  
24 pelvis in February 2010, which is within the period at issue; and records from the  
25 ER on February 12, 2010 also show she “fell yesterday reinjuring her pelvis.” Tr.  
26 1690. The provider noted at that time “she has had chronic pelvic pain after  
27 suffering a nondisplaced pelvic rami fracture a couple years ago” and that “she has  
28 been followed for quite some time for this and is on chronic Oxycontin . . . and



1 Percocet . . . which she takes a couple of times a day for breakthrough pain.” Tr.  
2 1690-91.

3 The ALJ also did not discuss relevant findings from a February 2009  
4 appointment with her orthopedic surgeon, which was two months from her alleged  
5 onset date, and showed continued issues with her pelvis, including possible  
6 nonunion of the fractures(s) 13 months after her 2008 injury and pelvic fractures.  
7 *Id.* At that time, her orthopedist noted her report she fell hard onto her left hip and  
8 that she reported increased pain, and the specialist observed objective findings  
9 upon physical exam including decreased range of motion, crepitus on the left  
10 “where the psoas tendon rides,” and “mildly positive Stinchfield test on that side as  
11 well,” which Plaintiff notes is a test for assessing hip pathology. Tr. 1340; *see*  
12 ECF No. 16 at 9. The specialist diagnosed her with left hip pain secondary to  
13 psoas tendonitis, and possible continued nonunion of her left superior pubic ramus  
14 fracture two months from her alleged onset date. *Id.* The ALJ did not discuss the  
15 orthopedist’s findings and appeared focused on her use of narcotic pain medicine;  
16 the ALJ noted that in February 2009, “however, the [Plaintiff] requested additional  
17 medication after a reported fall while going down to the laundry room.” Tr. 878  
18 (citing Tr. 1349). The ALJ’s failure to address relevant objective evidence and  
19 focus on her use of narcotic pain medication, even though the records cited by the  
20 ALJ cited show her doctors prescribed these medications for chronic pain and  
21 monitored her use of them, minimized Plaintiff’s reports of pain. For example, the  
22 ALJ noted “despite her reports of pain, she was apparently able to go bowling in  
23 March 2009,” but the ALJ also noted records showed she entered a narcotic pain  
24 medication contract with Dr. Abbott in June 2009 as part of her treatment for  
25 chronic pain from prior injuries. Tr. 878. The ALJ also cited records which show  
26 she was treated for chronic pain throughout the period at issue, which supports her  
27 symptom claims; records from this time show chronic pain in her neck/cervical  
28 spine, low back, pelvis and hip due to multiple traumas including fractures, and

1 degenerative disc and degenerative joint disease. *See e.g.*, Tr. 304, 307, 310, 313,  
2 316, 319, 322.

3 The ALJ noted “she also reported in October 2009 that she had lumbar pain,  
4 and Dr. Abbott reported she exhibited ‘tenderness in the bilateral lumbar  
5 paravertebral muscles and the lumbar spine’”; and the ALJ noted “Plaintiff rated  
6 her average pain as 4/10 in severity . . . 7/10 at worst.” Tr. 878 (citing Tr. 313,  
7 316). The ALJ does not discuss x-rays taken at the time of her January 2008  
8 hospitalization, however, which included findings of advanced degenerative disc  
9 disease in the lower lumbar spine and, to a lesser extent, the SI joints. Tr. 2405.  
10 The ALJ concluded “records from the relevant period primarily shows that Dr.  
11 Abbott refilled the Plaintiff’s narcotic pain medication prescriptions each month  
12 and noted only vague ‘tenderness’ over the cervical and lumbar spine in his notes.”  
13 Tr. 878 (citing Tr. 322, 325, 357). However, the ALJ cited to only three visits  
14 during the period at issue, did not discuss previous traumatic injuries, which  
15 treating provider Dr. Abbott indicated were the cause of her chronic pain,  
16 discussed only some of the objective findings upon exam, and concluded such  
17 findings were “vague” without explanation. Tr. 878. The ALJ noted, for example,  
18 that in February 2010 Plaintiff went to the ER with reports of increased pelvic  
19 pain, and that after that “Dr. Abbott added Gabapentin to her medication regimen.”  
20 Tr. 878 (citing Tr. 334, 339). Treatment records reveal at the follow up visit with  
21 Dr. Abbott, however, he noted her history of chronic back and pelvic pain due to  
22 multiple traumas, he observed objective findings including antalgic gait upon  
23 exam, and only then added gabapentin to her narcotic pain control regimen. Tr.  
24 339.

25 The ALJ’s characterization of the evidence also resulted in minimizing her  
26 other severe impairments and her symptoms. The ALJ noted Plaintiff’s “history of  
27 left shoulder complaints in 2006 and 2007 with treatment including injections,”  
28 and noted she went to the ER in June 2010 reporting left shoulder pain, and that x-

1 ray at that time “revealed a likely bone infarct of the proximal humeral  
2 metaphysis.” Tr. 879. The ALJ does not discuss this evidence further, noting only  
3 that Dr. Abbott “increased her pain medication dosage in June and July 2010, but  
4 his treatment notes only included findings of ‘tenderness.’” Tr. 879 (citing Tr.  
5 365, 367). Records from the ER visit, however, show she reported left shoulder  
6 pain for two months along with a remote injury, and x-ray at that time showed  
7 likely bony infarct of proximal humeral metaphysis less likely an enchondroma.  
8 Tr. 602-03. While the ALJ found she had a left shoulder impairment, there is  
9 limited discussion of objective evidence supporting her symptoms, and no  
10 limitation in the RFC for this impairment.

11 The ALJ also found hypertension as a severe impairment. Tr. 874. The ALJ  
12 appeared to discount hypertension during the period at issue, however; the ALJ  
13 noted one appointment in January 2010 when Dr. Abbott reported Plaintiff’s high  
14 blood pressure was “white coat,” because “her blood pressure tested normal at  
15 home but not in his office.” Tr. 878 (citing Tr. 325). At that time, however, Dr.  
16 Abbott was treating Plaintiff with *two* medications for hypertension, and records  
17 show persistent often uncontrolled hypertension prior to and throughout the period  
18 at issue. *See, e.g.*, Tr. 343, 354, 2537. Records also show Dr. Abbott increased  
19 Metoprolol, one of her two blood pressure medications, a few weeks later after  
20 poorly controlled hypertension was noted at her ER visit in February 2010. Tr.  
21 333-34, 339. Further, at the end of the same paragraph in the decision finding  
22 hypertension was only “white coat,” the ALJ then discounted her report she often  
23 needed to lie in bed all day by attributing her symptoms to hypertension; the ALJ  
24 concluded one occasion when she reported she had to lie in bed “was apparently  
25 during an episode of high blood pressure where she felt ill overall.” Tr. 879. The  
26 analysis is contradictory, minimizes her symptom claims, and does not accurately  
27 reflect the medical evidence during the period at issue.  
28

1 The ALJ failed to discuss relevant medical evidence and misstated evidence,  
2 including her history of pelvic fractures, which Plaintiff's treating physician  
3 indicated was her "major injury" prior to her date last insured, as discussed *supra*.  
4 An ALJ must consider all of the relevant evidence in the record and may not point  
5 to only those portions of the records that bolster his findings. *See, e.g., Holohan v.*  
6 *Massanari*, 246 F.3d 1195, 1207-08 (9th Cir. 2001) (holding that an ALJ cannot  
7 selectively rely on some entries in plaintiff's records while ignoring others). In  
8 citing portions of the record that show milder examination findings while the  
9 longitudinal record shows more mixed results during the relevant period at issue,  
10 the ALJ's characterization of the record is not supported by substantial evidence.  
11 The ALJ's conclusion that Plaintiff's symptom testimony is not consistent with  
12 objective medical evidence is therefore not supported by substantial evidence.

## 13 2. Activities

14 The ALJ concluded that Plaintiff's activities were inconsistent with her  
15 allegations. Tr. 878. The ALJ may consider a claimant's activities that undermine  
16 reported symptoms. *Rollins*, 261 F.3d at 857. If a claimant can spend a substantial  
17 part of the day engaged in pursuits involving the performance of exertional or non-  
18 exertional functions, the ALJ may find these activities inconsistent with the  
19 reported disabling symptoms. *Fair*, 885 F.2d at 603; *Molina*, 674 F.3d at 1113.  
20 "While a claimant need not vegetate in a dark room in order to be eligible for  
21 benefits, the ALJ may discount a claimant's symptom claims when the claimant  
22 reports participation in everyday activities indicating capacities that are  
23 transferable to a work setting" or when activities "contradict claims of a totally  
24 debilitating impairment." *Molina*, 674 F.3d at 1112-13.

25 Here, the ALJ found "despite her reports of pain, she was apparently able to  
26 go bowling in March 2009." Tr. 878 (citing Tr. 1353). The ALJ also noted that at  
27 an appointment in October 2009 "she also stated that she was currently working  
28 and enjoyed her job." Tr. 878 (citing Tr. 316). The ALJ discussed her part-time

1 work activity in 2009 at step one, however, noting earnings records show only  
2 \$1,048,50 in income in 2009, far below SGA levels; and Plaintiff testified at the  
3 2017 hearing that she tried to work over at a Pier 1 store in 2009, but this was not  
4 full-time work and she had difficulty doing the work due to pain. Tr. 874; *see e.g.*,  
5 Tr. 50-54, 968-69. At the visit where she reported she enjoyed her job, she also  
6 reported her pain level was 7/10. Tr. 316. While she reported she went bowling  
7 one time in March 2009, she also injured her knee at that time, and the ALJ did not  
8 discuss this or any other activity further.

9       These general findings are insufficient to undermine Plaintiff's symptom  
10 claims. It is well-established that a claimant need not be "utterly incapacitated" to  
11 be eligible for benefits. *Fair*, 885 F.2d at 603. The Court also cannot affirm the  
12 ALJ's credibility decision based on evidence that the ALJ did not discuss. *Connett*  
13 *v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). Here, while the ALJ mentions  
14 Plaintiff's one time bowling and report she was working and enjoying it one  
15 occasion, these facts are briefly noted without any accompanying discussion of  
16 their import on the disability analysis, what symptoms were undermined by these  
17 activities, or why. *See* Tr. 878. Without further explanation of the ALJ's  
18 reasoning, a finding that Plaintiff's activities were inconsistent with her symptom  
19 claims is not supported by substantial evidence, and this was not a clear and  
20 convincing reason to discount her symptom claims.

### 21       3. *Lack of Treatment*

22       Defendant contends "the ALJ reasonably determined that Plaintiff's  
23 allegations of disabling impairments were incompatible with lack of treatment  
24 during the relevant period," but the page Defendant cites to, Tr. 884, is not part of  
25 the text of the decision. ECF No. 19 at 9; *see* Tr. 871-83. While the ALJ did note  
26 that "despite the voluminous record, the evidence from the relevant period is  
27 relatively small" in discussing Plaintiff's symptom complaints, Tr. 878, the only  
28 place the ALJ mentioned limited medical treatment during the relevant period was

1 at step two, when the ALJ found “little to no treatment of her hips” during the  
2 period at issue. Tr. 874. The Court will therefore not consider Defendant’s *post*  
3 *hoc* rationalization. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) (The  
4 Court will “review only the reasons provided by the ALJ in the disability  
5 determination and may not affirm the ALJ on a ground upon which he did not  
6 rely.”).

7 The Court also notes that the period at issue from her alleged onset date to  
8 her date last insured was 14 months in a record that spans over a decade, but that  
9 records during that brief amount of time show regular treatment by Dr. Abbott and  
10 specialists, including daily narcotic pain medication for chronic pain from her prior  
11 injuries; Dr. Abbott and others indicated her symptoms, including chronic pain,  
12 were a result of her history of multiple fractures/traumatic injuries, some of which  
13 the ALJ failed to discuss prior to her date last insured.

14 The ALJ’s failed to provide clear and convincing reasons supported by  
15 substantial evidence to reject Plaintiff’s claims. In the absence of a clear and  
16 convincing reason to discount symptom reports, the limitations in a claimant’s  
17 symptom reports must be made part of the RFC. *See Lingenfelter v. Astrue*, 504  
18 F.3d 1028, 1035 (9th Cir. 2007) (“[T]he ALJ failed to provide clear and  
19 convincing reasons for finding Lingenfelter’s alleged pain and symptoms not  
20 credible, and therefore was required to include these limitations in his assessment  
21 of Lingenfelter’s RFC.”). Upon remand the ALJ shall reevaluate the medical  
22 evidence and reconsider Plaintiff’s symptom claims, providing clear and  
23 convincing reasons supported by substantial evidence to discount her claims, or  
24 including them in the RFC.

## 25 **B. Medical Opinions**

26 Plaintiff contends the ALJ erred by improperly evaluating the medical  
27 opinions of Michael Abbott, MD, Rox Burkett, MD, and Louis Fuchs, MD. ECF  
28 No. 16 at 9-19.

1        There are three types of physicians: “(1) those who treat the claimant  
2 (treating physicians); (2) those who examine but do not treat the claimant  
3 (examining physicians); and (3) those who neither examine nor treat the claimant  
4 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”  
5 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).  
6 Generally, a treating physician’s opinion carries more weight than an examining  
7 physician’s opinion, and an examining physician’s opinion carries more weight  
8 than a reviewing physician. *Id.* at 1202. “In addition, the regulations give more  
9 weight to opinions that are explained than to those that are not . . . and to the  
10 opinions of specialists concerning matters relating to their specialty over that of  
11 nonspecialists.” *Id.* (citations omitted). If a treating or examining physician’s  
12 opinion is uncontradicted, the ALJ may reject it only by offering “clear and  
13 convincing reasons that are supported by substantial evidence.” *Bayliss v.*  
14 *Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005); *Lester v. Chater*, 81 F.3d 821, 830  
15 (9th Cir. 1995). “If a treating or examining doctor’s opinion is contradicted by  
16 another doctor’s opinion, an ALJ may only reject it by providing specific and  
17 legitimate reasons that are supported by substantial evidence.” *Id.* The opinion of  
18 a nonexamining physician may serve as substantial evidence if it is supported by  
19 other independent evidence in the record. *Andrews*, 53 F.3d at 1041.

20        *1. Dr. Abbott*

21        In October 2017 and August 2020 Plaintiff’s treating physician, Dr. Abbott,  
22 completed medical report forms and provided his opinion on Plaintiff’s level of  
23 functioning during the period at issue. Tr. 862-63, 2658-60. In 2017, Dr. Abbott  
24 opined Plaintiff’s diagnoses included “multitrauma due to fall including pelvic  
25 fracture and left elbow fracture” in 2007 and history of motor vehicle accident with  
26 “scapula fracture” in 2006. Tr. 872. He noted that “MRI confirmed multiple  
27 fractures.” *Id.* He reported that in “2009-2010, during the day she spent 8-12  
28 hours lying down” and that treatment during that time included narcotic “pain



1 meds (oxycodone).” *Id.* He opined her physical conditions were likely to cause  
2 her pain, her prognosis was fair, and he reported that in “2009-2010, she tried to  
3 work at Pier 1 ... but it caused more pain.” Tr. 861-62. He opined that in 2009-  
4 2010 she was severely limited and unable to meet the demands of full-time  
5 sedentary work, or to physically travel on a daily basis. Tr. 862.

6 In 2020, Dr. Abbott opined her diagnoses were history of 2007 pelvic  
7 fracture and elbow fracture, and 2006 history of motor vehicle accident scapula  
8 fracture and he explained her “major injury” was the December 31, 2007 fall, and  
9 that her 2006 motor vehicle accident was a “moderate injury.” Tr. 2658. He  
10 explained that in 2009-2010 she was treated with oxycodone, which “could have  
11 caused drowsiness/constipation” in 2009-2010. *Id.* He opined due to her trauma  
12 history she had conditions likely to cause pain. *Id.* He opined her prognosis was  
13 fair and that she tried to work in 2009-2010 but it caused pain, and that in 2009-  
14 2010 she was severely limited and unable to meet the demands of full-time  
15 sedentary work, or to physically travel on a daily basis. Tr. 2659. The ALJ gave  
16 Dr. Abbott’s opinions little weight. Tr. 879. As Dr. Abbott’s opinions were  
17 contradicted by the opinion of Dr. Fuchs and the state agency examiners, the ALJ  
18 was required to give specific and legitimate reasons to reject Dr. Abbott’s opinion.  
19 *See Bayliss*, 427 F.3d at 1216.

20 The ALJ gave Dr. Abbott’s opinions little weight because they were  
21 rendered seven and ten years after the date last insured, and “his own treatment  
22 notes from the relevant period are generally unsupportive of the restrictions he  
23 assessed,” he did not explain his opinion, and it was vague and unsupported by the  
24 evidence of record. Tr. 879. Plaintiff contends the ALJ failed to give legally  
25 sufficient reasons to discount the treating source opinion because Dr. Abbott’s  
26 opinion was relevant to her conditions during the period at issue, the ALJ  
27 speculated and misstated the record, and Dr. Abbott’s treatment records were  
28 consistent with his opinion, and he provided specific functional limitations based

1 on his experience and treatment records during the period at issue, which  
2 documented objective findings, along with Plaintiff's reports of pain and continued  
3 treatment with narcotic pain medication. ECF No 16 at 12-16. Defendant  
4 contends the ALJ reasonably gave little weight to Dr. Abbott's 2017 and 2020  
5 opinions, because they were inconsistent with contemporaneous treatment notes,  
6 which showed only some tenderness in Plaintiff's neck and back, but otherwise  
7 "described routine medication management"; and because Dr. Abbott's opinions  
8 were unsupported by the record and "the evidence of record shows that Plaintiff's  
9 condition improved following her 2006 accident." ECF No. 19 at 15-16.

10 The ALJ gave the opinions little weight because they were rendered 7 and  
11 10 years after Plaintiff's date last insured. Tr. 879. The ALJ is required to  
12 consider "all medical opinion evidence." *Tommasetti v. Astrue*, 533 F.3d 1035,  
13 1041 (9th Cir. 2008) (citing 20 C.F.R. § 404.1527(b)). Additionally, the extent to  
14 which a medical source is "familiar with the other information in [the claimant's]  
15 case record" is relevant in assessing the weight of that source's medical opinion.  
16 See 20 C.F.R. §§ 404.1527(c)(6). Here, although Dr. Abbott provided his opinions  
17 many years after Plaintiff's date last insured, he indicated he was her treating  
18 provider during the period at issue and he explained on the form he provided that  
19 his opinion was based on his treatment records from that time. Tr. 862-63, 2658-  
20 60. Dr. Abbott is her primary care provider who has treated her from 2006 through  
21 present, including during the period at issue, and on this record the fact that his  
22 opinions were rendered 7 and 10 years after her date last insured was not a specific  
23 and legitimate reason to give his opinion little weight.

24 The ALJ also gave Dr. Abbott's opinions little weight because "his own  
25 treatment notes from the relevant period are generally unsupportive of the  
26 restrictions he assessed," he did not explain his opinion, and it was vague and  
27 unsupported by the evidence of record. Tr. 879. Relevant factors to evaluating  
28 any medical opinion include the amount of relevant evidence that supports the

1 opinion, the quality of the explanation provided in the opinion, and the consistency  
2 of the medical opinion with the record as a whole. *Lingenfelter*, 504 F.3d at 1042;  
3 *Orn*, 495 F.3d at 631. A physician’s opinion may also be rejected if it is  
4 unsupported by the physician’s treatment notes. *Connett v. Barnhart*, 340 F.3d  
5 871, 875 (9th Cir. 2003). Here, the ALJ concluded “[Dr. Abbott] states she was  
6 unable to walk for three months, but this likely refers to her status after the 2006  
7 motor vehicle accident, and Dr. Abbott does not offer further clarification,” and  
8 “his entire assessment seems to hinge of the injuries sustained from the accident, as  
9 he included pelvic fracture, scapula fracture, and left elbow fracture as her sole  
10 diagnosis.” Tr. 879.

11 As discussed in relation to Plaintiff’s symptom complaints, *supra*, however,  
12 this is a misstatement of the evidence, as Plaintiff suffered *two* accidents, including  
13 a serious fall with injuries that the ALJ failed to discuss, and which Dr. Abbott  
14 explained was her “major injury” in his 2020 opinion. Tr. 2658. Dr. Abbott  
15 explained that due to her history of traumatic injuries she had conditions likely to  
16 cause pain in 2009-2010; and that at that time she was treated with oxycodone,  
17 with side effects including drowsiness, and this is consistent with his and other  
18 providers treatment records from the time showing chronic pain in her neck, back,  
19 and pelvis status post multiple fractures. Tr. 2658; *see, e.g.*, Tr. 307, 310, 313,  
20 316, 319, 322, 334. While the ALJ found Dr. Abbott’s opinion vague, he indicated  
21 that in 2009-2010 she was severely limited and unable to meet the demands of full-  
22 time sedentary work, or to physically travel on a daily basis, which are concrete  
23 limitations; and his findings are consistent with his treatment records from that  
24 time, showing she attempted to return to work and could not sustain it due to pain.  
25 Tr. 2659. The ALJ’s finding Dr. Abbott’s opinion was due little weight because  
26 his treatment notes from the relevant period are generally unsupportive of the  
27 restrictions he assessed, he did not explain his opinion, and it was vague and  
28 unsupported by the evidence of record is not supported by substantial evidence,

1 and this was not a specific and legitimate reason to reject the treating provider's  
2 opinions.

3       2. *Dr. Burkett*

4       In November 2017, Dr. Burkett reviewed Plaintiff's file and rendered an  
5 opinion on her level of functioning. Tr. 863-67. Dr. Burkett diagnosed her with  
6 fracture cervical spine with C5-C6 fusion from a 2006 MVA with ongoing neck  
7 pain; shoulder injuries, pelvic and hip injuries, degenerative arthritis of the hip,  
8 status post left hip replacement September 2016, hospitalization for pelvic fracture  
9 January 2008, and chronic pain management for failed spine surgeries. Tr. 865.  
10 He opined Plaintiff "has well documented injuries with MVA and fall from a deck  
11 in her records . . . she has had two major surgeries, one before her onset and one  
12 after." Tr. 866. He opined the records, which were not all available upon state  
13 agency review, fully support hip, back and pelvic injuries." *Id.* He opined  
14 considering her pain, combination of problems, and lack of sustainable function,  
15 she was "much more limited than the light level RFC" found by the state agency.  
16 *Id.* He opined with her neck problem "even after surgery," arm and shoulder pain,  
17 left hip problems "even after surgery," and "low back and pelvic pain and  
18 problems" she equaled listing 1.02 from her alleged onset date; and that she could  
19 equal listing 1.04 "for many of the same reasons counting all her orthopedic  
20 problems with issues of pain, weakness, and leg problems." *Id.* He further opined  
21 she could not "stand more than an hour per day at work and or [sic] lift over 5-10  
22 pounds with some reduction in gross manipulation to ½ of normal and little to no  
23 overhead reaching and limited stooping and twisting." He noted there is much  
24 more evidence after her date last insured that was not discussed, and mentioned  
25 weight bearing joint failure "quite early [in her] 50s . . . needed hip replacement on  
26 the left," along with "shoulder issues yet to be addressed" as of his 2017 review of  
27 medical records. Tr. 866. He explained she required opioids to manage her pain,  
28 that multiple imaging studies showed findings including advanced degenerative

1 changes in her left hip and degenerative changes in her pelvis and lower spine, and  
2 that she eventually required left hip replacement in 2016 “as a result of the chronic  
3 trauma for a younger person.” Tr. 865.

4 The ALJ did not explain the weight given to Dr. Burkett’s opinion, despite  
5 the Appeals Council order directing the ALJ to further evaluate whether Plaintiff’s  
6 impairments met or medically equaled a listed impairment, and to “give further  
7 consideration to the opinion evidence . . . and explain the weight given to such  
8 opinion evidence.” Tr. 880, 1039-40. In Social Security cases, when the Appeals  
9 Council remands a case to the ALJ, the ALJ must take any action ordered by the  
10 Appeals Council and must follow the specific instructions of the reviewing court.  
11 20 C.F.R. § 404.977; *Samples v. Colvin*, 103 F. Supp. 3d 1227, 1231-32 (D. Or.  
12 2015). The ALJ did note that “the AC also noted that Rox Burkett, M.D., opined  
13 that the [Plaintiff’s] impairments were medically equivalent in severity to listings  
14 1.20 and 1.04 prior to her date last insured” in his discussion of listed impairments  
15 at step three. Tr. 875. Elsewhere in the decision, however, in addressing Dr.  
16 Burkett’s medical opinion as to Plaintiff’s limitations the ALJ noted only that “Dr.  
17 Burkett did not elaborate on when these limitations began, but even assuming that  
18 he believed they began during the relevant period, they are unsupported by the  
19 objective evidence described above.” Tr. 880. Dr. Burkett explained more than  
20 once in his opinion that he “only focus[ed] on the information available in the  
21 insured time from 2006 to DLI of 6/30/2010,” however, noting that while he  
22 reviewed the entire record available to him in 2017 and Plaintiff “has scores of  
23 visits in the time since the DLI that only support worsening but according to policy  
24 will again limit the information up to the DLI.” Tr. 864, 865. The ALJ failed to  
25 assess and explain the weight given to Dr. Burkett’s opinion and her reasons to  
26 reject it were not supported by substantial evidence.  
27  
28

1           3. *Dr. Fuchs*

2           At the July 2020 hearing Dr. Fuchs testified and provided an opinion on  
3 Plaintiff's level of functioning. Tr. 953-67. Dr. Fuchs opined her impairments  
4 were status post C5-C6 fusion, and status post total hip arthroplasty in 2016. Tr.  
5 953. He testified that the records at issue showed only tenderness in the cervical  
6 and lumbosacral spine, no problems with her left shoulder, and "during that time  
7 period . . . I don't find any severe problems with [Plaintiff]. Tr. 954. He opined  
8 she did not meet or equal a listed impairment during the period at issue prior to her  
9 date last insured. Tr. 955. He opined she could continuously lift and carry 10  
10 pounds, "even frequently up to 20 lifting and carrying," and that she could sit for 2  
11 hours, stand and walk for one hour, "maybe two hours standing and/or walking";  
12 and he clarified, at the ALJ's request, that in an eight hour workday "she should be  
13 able to remain sedentary for six hours in the appropriate workplace . . . certainly  
14 three hours, clearly, that she should be able to ambulate, and maybe even four."  
15 Tr. 955-56. He opined she did not require use of a cane, had no limitation in the  
16 use of her hands, but that she should not use foot controls. Tr. 956. He testified  
17 she could occasionally climb stairs but not ladders or scaffolds; and she could  
18 frequently balance, occasionally stoop, kneel, and crouch, but should not crawl;  
19 she should avoid unprotected heights and vibration, could frequently operate a  
20 motor vehicle, and could have occasional exposure to wetness, extreme cold, and  
21 extreme heat. *Id.*

22           After the February 2021 supplemental hearing, on September 10, 2020 the  
23 ALJ forwarded additional evidence for Dr. Fuchs' review with a medical  
24 interrogatory. Tr. 2661-62. The ALJ asked him to review the new evidence and  
25 provided an interrogatory asking "does the additional medical evidence change  
26 your opinion given in your previous testimony regarding the nature and severity of  
27 [Plaintiff's] impairment(s) during the relevant time period?" *Id.* On October 21,  
28 2020, Dr. Fuchs submitted his response, explaining: "I do not have notes on my

1 original testimony,” but that “reviewing the current new material, I believe  
2 [Plaintiff] has the following abilities.” Tr. 2665-66. He opined she could lift and  
3 carry 10 pounds continuously and 20 pounds occasionally; sit for two hours at one  
4 time and stand and walk one hour at a time; and in an eight hour day she could sit  
5 six hours and stand and/or walk four hours. Tr. 2666. Regarding “upper limbs,”  
6 he opined she could perform “occasional overhead bilaterally [and] with no further  
7 limits”; and “foot controls occasional.” *Id.* Regarding postural limitations, he  
8 opined she could occasionally climb stairs and ramps but no ladders; she could  
9 occasionally balance, stoop, kneel, and crouch, but could not crawl. *Id.* Regarding  
10 environmental limitations, he opined “no heights, occasional mechanical, motor  
11 vehicle, humidity. No extreme cold, heat, vibrations.” *Id.* He opined she had “no  
12 limits re shopping, transportation etc.” *Id.*

13 The ALJ gave Dr. Fuchs’ opinion significant weight because he had the  
14 opportunity to review the entire medical record, he is a board-certified orthopedic  
15 surgeon, he is familiar with Social Security regulations, and “the record support[s]  
16 his opinion far more than the opinions of Drs. Burkett and Abbott.” Tr. 880.

17 Plaintiff contends the ALJ failed to provide any explanation or citation to  
18 support his finding that Dr. Fuchs’ opinion was supported more by the record than  
19 Dr. Burkett and Dr. Abbott, and notes that Dr. Burkett is also familiar with the  
20 social security regulations. ECF No. 16 at 18-19. Defendant contends the ALJ  
21 reasonably gave Dr. Fuchs’ opinion significant weight because it was informed by  
22 the entire medical record, he was a specialist familiar with the Social Security  
23 Regulations, and the ALJ discussed the relevant objective evidence at several  
24 points in the decision in connection with Plaintiff’s symptom testimony, as well as  
25 in her analysis of Dr. Abbott’s opinion. ECF No. 19 at 18. However as discussed  
26 *supra*, the ALJ erred in her discussion of Plaintiff’s symptom testimony, and her  
27 conclusions concerning Dr. Abbott’s opinions were not supported by substantial  
28 evidence. Further, upon questioning by Plaintiff’s representative at the hearing,



1 Dr. Fuchs testified he “had not made note of” the opinions of Dr. Abbott and Dr.  
2 Burkett along with other relevant evidence, and he was unable to answer questions  
3 about the opinions of Dr. Burkett and Dr. Abbott and appeared unfamiliar with  
4 other aspects of Plaintiff’s record; the ALJ noted Plaintiff’s concern that Dr. Fuchs  
5 had not carefully reviewed the record, such that he appeared to be viewing  
6 evidence including the opinions of Dr. Burkett and Dr. Abbott for the first time at  
7 the hearing, was not aware of all of Plaintiff’s impairments during the period at  
8 issue, and failed to cite to any records in his response to the new evidence. Tr.  
9 875, 1207; *see, e.g.*, Tr. 960, 964-967. The ALJ’s conclusion that Dr. Fuchs  
10 opinion was due significant weight because the record supports his opinion far  
11 more than the opinions of Dr. Burkett and Dr Abbott is not supported by  
12 substantial evidence.

### 13 **C. Other Issues**

14 Plaintiff also contends the ALJ erred by not assessing disability under the  
15 Grid Rules; the ALJ failed to meet her step five burden; and the ALJ failed to  
16 properly assess the lay witness opinions. ECF No. 16 at 5-7, 19-21. As the case is  
17 remanded for errors in assessing the medical testimony and plaintiff symptom  
18 claims, the ALJ shall reperform the sequential analysis, making new findings at  
19 each step and taking the testimony of a vocational expert, and shall reconsider all  
20 lay witness statements, crediting the opinions or providing germane reasons to  
21 discount them.

### 22 **CONCLUSION**

23 Plaintiff argues the decision should be reversed and remanded for the  
24 payment of benefits. ECF No. 19 at 20. The Court has the discretion to remand  
25 the case for additional evidence and findings or to award benefits. *Smolen*, 80 F.3d  
26 at 1292. The Court may award benefits if the record is fully developed and further  
27 administrative proceedings would serve no useful purpose. *Id.* Remand is  
28 appropriate when additional administrative proceedings could remedy defects.

1 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). The Court will also not  
2 remand for immediate payment of benefits if “the record as a whole creates serious  
3 doubt that a claimant is, in fact, disabled.” *Garrison*, 759 F.3d at 1021.

4 Here, the Court finds that further proceedings are necessary because the ALJ  
5 limited her discussion of the evidence to the distant 2010 date last insured, and  
6 there are significant medical records and treatment after that date. The Court  
7 therefore remands the claim for further proceedings for the ALJ to reconsider all  
8 relevant medical evidence and reevaluate Plaintiff’s symptom claims, to reassess  
9 conflicting medical opinion evidence, and to perform the five-step sequential  
10 evaluation anew. For these reasons, the Court remands this case for further  
11 administrative proceedings.

12 The ALJ’s decision is not supported by substantial evidence and not free of  
13 harmful legal error. On remand, The ALJ shall reevaluate the medical evidence of  
14 record, being mindful to consider all Plaintiff’s impairments, make new findings  
15 on each of the five steps of the sequential evaluation process, take the testimony of  
16 a vocational expert, and issue a new decision. The ALJ shall reassess all medical  
17 opinion evidence and shall also reassess plaintiff’s subjective complaints, taking  
18 into consideration any other evidence or testimony relevant to Plaintiff’s disability  
19 claim.

20 Accordingly, **IT IS ORDERED:**

21 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 16**, is  
22 **GRANTED**.

23 2. Defendant’s Motion for Summary Judgment, **ECF No. 19**, is  
24 **DENIED**.

25 3. The matter is **REMANDED** to the Commissioner for additional  
26 proceedings consistent with this Order.

27 4. An application for attorney fees may be filed by separate motion.  
28

1 The District Court Executive is directed to file this Order and provide a copy  
2 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and  
3 the file shall be **CLOSED**.

4  
5 DATED February 14, 2023.



*Alexander C. Ekstrom*

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ALEXANDER C. EKSTROM  
UNITED STATES MAGISTRATE JUDGE